

2575

1. TEACHER FIRST EMPLOYED IN SCHOOL DISTRICT— LESS THAN EIGHT HUNDRED PUPILS— SUBSEQUENT TO SEPTEMBER 1, 1941—EFFECTIVE DATE, FORMER SECTION 7690-2 GC, NOW SECTION 4842-8 GC — TEACHERS' TENURE ACT — EMPLOYMENT AND REEMPLOYMENT GOVERNED BY PARAGRAPHS a, b, c, d, SECOND PROVISIO CONTAINED IN SECTION.
2. TEACHER UNDER ABOVE CONDITIONS WHO IS ELIGIBLE UNDER LAW FOR CONTINUING CONTRACT, MAY BE RECOMMENDED BY COUNTY SUPERINTENDENT FOR REEMPLOYMENT ON CONTINUING CONTRACT—BY MAJORITY VOTE OF MEMBERSHIP, BOARD OF EDUCATION MAY REJECT RECOMMENDATION.
3. TEACHER AFTER ORIGINAL EMPLOYMENT WAS REEMPLOYED ON THREE YEAR CONTRACT — MAY BE REEMPLOYED—BOARD UNDER NO OBLIGATION TO REEMPLOY HIM—IF REEMPLOYED UNDER SECTION 4842-8, PARAGRAPH d, HE MUST BE GIVEN A FIVE YEAR CONTRACT OR BOARD MAY AT ANY TIME GRANT CONTINUING CONTRACT.

## SYLLABUS:

1. Where a teacher is first employed in a school district of less than eight hundred pupils, subsequent to the first day of September, 1941, the effective date of former Section 7690-2, now Section 4842-8, of the General Code, known as the Teachers Tenure Act, his employment and reemployment are governed by the provisions of paragraphs a, b, c and d, of the second proviso contained in such section.

2. A teacher who was first employed in a school district of less than eight hundred pupils, subsequent to the first day of September, 1941, the effective date of the Teachers Tenure Act, and who is eligible under the law for a continuing contract, may be recommended by the county superintendent for reemployment on such continuing contract, but the board of education may reject such recommendation by a majority vote of its membership.

3. Such teacher, who, after his original employment was reemployed on a three year contract, may upon the expiration of that contract, be reemployed, but the board is under no obligation to reemploy him. However, if he is then reemployed under the provisions of paragraph "d" of the second proviso of Section 4842-8, General Code, he must be given a five year contract or the board may at any time grant him a continuing contract.

Columbus, Ohio, May 8, 1953

Hon. Hugh I. Troth, Prosecuting Attorney  
Ashland County, Ashland, Ohio

Dear Sir:

I have before me your letter, requesting my opinion and reading as follows:

"I hereby request your opinion on the following questions under O.G.C. 4842-8:

"Must a school board of a school district of under 800 pupils give a continuing contract to a teacher eligible for continuing service, by reason of the fact that he has had two three-year contracts and is recommended by the county superintendent of schools, if the vote of the school board is three against hiring the teacher and two for hiring the teacher?

"Under the same circumstances, must a school board give the teacher a contract for a five year period under subsection (d) of 4842-8?"

Under the provisions of Section 4842-6, General Code, all teachers are to be employed only upon the nomination of the superintendent, in the case of local districts, upon the nomination of the county superintendent. There is nothing in that section which requires the board to employ a teacher merely because the superintendent recommends his employment.

Section 4842-7, General Code, requires that teachers are to be employed under contracts and divides such contracts into limited contracts and continuing contracts. Limited contracts are for terms of years not exceeding five; continuing contracts are defined as follows:

"\* \* \* A continuing contract shall be a contract which shall remain in full force and effect until the teacher resigns, elects to retire, or is retired pursuant to section 7896-34 of the General Code, or until it is terminated or suspended as provided by law and shall be granted only to teachers holding professional, permanent or life certificates. \* \* \*"

Section 4842-8, General Code, reads as follows:

"*Teachers eligible for continuing service status in any school district* shall be those teachers qualified as to certification who within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing con-

tract status elsewhere, have served two years in the district, but the board of education, upon the superintendent's recommendations, may at the time of employment or at any time within such two-year period declare any of the latter teachers eligible.

*“Upon the recommendation of the superintendent of schools that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between a board of education and such teacher unless the board by a three-fourths vote of its full membership rejects the superintendent's recommendation. However, the superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons therefor on or before the thirtieth day of April, but upon subsequent reemployment only a continuing contract may be entered into.*

“Provided, however, that on or before September 1, 1941, a continuing contract shall be entered into by each board of education with each teacher holding a professional, permanent or life certificate who, at the time of the passage of this act, is completing five or more consecutive years of employment by said board.

“A limited contract may be entered into by each board of education with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

“Any teacher employed under a limited contract shall at the expiration of such limited contract be deemed re-employed under the provisions of this act at the same salary plus any increment provided by the salary schedule unless the employing board shall give such teacher written notice of its intention not to re-employ him or her on or before the thirtieth day of April or thirty days prior to the termination of such teacher's school year, whichever date occurs the earlier. Such teacher shall be presumed to have accepted such employment unless he shall notify the board of education in writing to the contrary on or before the first day of June, and a contract for the succeeding school year shall be executed accordingly. *Provided, however, that in school districts of under eight hundred pupils, the following contract system shall control:*

- a. Beginning teachers, who have not previously been employed as a teacher in any school, shall be hired for one year.
- b. New teachers, who have had at least one year's experience as teachers in other schools, shall be employed for a period of time

commensurate with their past experience at the discretion of the hiring board of education, provided that no such contract shall be for more than five years.

"c. Upon re-employment after the termination of the first contract, the new contract shall be for not less than two years nor more than five years provided that the teacher's educational qualifications have been fulfilled and the teacher's work has been satisfactory.

"d. Upon re-employment after the termination of the second contract, the teacher's contract shall be for five years and subsequent renewal thereof shall be for five-year periods, or the board of education may at any time grant a continuing contract."  
(Emphasis added.)

This section as enacted in the new school code of 1943, 120 O. L., 475, was substantially the same as former Section 7690-2, 119 Ohio Laws, 452. The new section has undergone slight amendment, but without substantial change of its general provisions.

It will be noted that the first four paragraphs and all but the last sentence of the fifth paragraph of Section 4842-8, are general in their terms and, standing alone, would apply to all school districts, regardless of their number of pupils. But the last sentence of the fifth paragraph introduces an exception:

"Provided, however, that in school districts of under eight hundred pupils, the *following contract system shall control.*"  
(Emphasis added.)

At first thought, it might appear that the legislature intended to take these small districts entirely out of the provisions of the fore part of the section, and establish a wholly different procedure and quite different rights. There is some support for that conclusion in the fact that whereas the general provisions give teachers certain definite rights to continuing contracts under certain conditions, paragraph "d", relating to these small schools, concludes with the statement that "the board of education *may at any time* grant a continuing contract." Furthermore, these lettered paragraphs "c" and "d" give these teachers certain special rights not enjoyed by teachers generally, as to the term of their renewal contracts. It appears, however, upon a close analysis of the section that the special provisions relative to the small districts relate only to the *term* for which they are to be employed, and that they have some of the rights

set out in the general provisions. *State ex rel. Foster v. Board of Education*, 151 Ohio St., 413.

It becomes important to note the date of the passage of the original act, to wit, June 2, 1941; also the date when it took effect, to wit, September 1, 1941. The first is the time as of which each teacher who had had "five or more consecutive years of employment" by any board was to be given a continuing contract.

That this right belonged to a teacher in the districts having less than eight hundred pupils was held by the Supreme Court in the case of *State ex rel. Bishop v. Board of Education*, 139 Ohio St., 427. There were three other teachers' claims which were considered with the claim of Bishop, all involving the right of the four teachers to receive continuing contracts under that provision of Section 7690-2, later Section 4842-8, which then read:

" \* \* \* Provided, however, that on or before September 1, 1941, a continuing contract shall be entered into by each board of education with each teacher holding a professional, permanent or life certificate who, at the time of the passage of this act, is completing five or more consecutive years of employment by said board. \* \* \*"

That provision was introduced into the teachers Tenure Act, with the obvious purpose of giving to *all teachers* who at the time of the passage of the original act, had taught in a given district for five or more consecutive years, continuing contracts without any nomination by the superintendent and independent of the will of the board.

The court found that each of the four claimants qualified for the continuing contracts which they claimed under that provision, and held:

"1. Under the first proviso of Section 7690-2, General Code (119 Ohio Laws, 451), a part of the Ohio Teachers' Tenure Act, a teacher in the public schools holding a professional, permanent or life certificate, who was completing five or more consecutive years of employment by any board of education at the time of the passage of the act, was entitled to the tender of a continuing contract of employment by such board on September 1, 1941, or within a reasonable time thereafter."

But in the course of the opinion, at page 442, it was said:

"In the Oscar M. Bishop case, two additional reasons are advanced as to why he should not succeed in his action. First, it

is urged that since the Mt. Orab Village School District has an average daily attendance of less than 800 pupils, relator cannot claim the benefit of the first proviso of Section 7690-2, General Code. *From an analysis of that part of the section relating to school districts of under 800 pupils and embracing subdivisions a, b, c and d, we are satisfied that it has reference only to beginning teachers, new teachers, and to their reemployment, and does not affect the relator Bishop.*" (Emphasis added.)

The court used practically the same language as paragraph 5, of its syllabus, in the following words:

"The second proviso of Section 7690-2, General Code, relating to a contract system in school districts of less than eight hundred pupils, has reference to beginning teachers, new teachers and to their re-employment, and is without application to a certificated teacher completing five or more consecutive years of employment in such a school district."

The reason why paragraphs a, b, c and d, of the second proviso could not affect Bishop is obvious when we note that he had been employed by the board in question for a number of years before the Teachers Tenure Act came into being. Until it was enacted, there was no such classification in the school laws as to "beginning teachers" and "new teachers." Consequently, the regulation as to re-employment of these teachers could have no bearing on him.

In other words, and putting it generally, those teachers who were employed in any school district prior to September 1, 1941, the effective date of that Act, were thereafter to have the general rights as to reemployment, set out in the fore part of Section 4842-8 supra, and the related sections to which I have referred, while those teachers who came into service of a school district having less than eight hundred pupils, after September 1, 1941, came in either as "beginning teachers" or "new teachers" as defined by the statute, and thereafter, if re-employed, were to be governed by the provisions of paragraphs "c" and "d" of the "second proviso."

This distinction is rather clearly pointed out in Opinion No. 4025, Opinions of the Attorney General for 1941, page 627. The opinion was rendered shortly prior to the decision of the Bishop case, but it bears a striking resemblance to the court's pronouncement. The second paragraph of the syllabus reads as follows:

"Under the terms of Section 7690-2, General Code, as enacted

in House Bill No. 121, of the 94th General Assembly, effective September 1, 1941, *teachers in the public schools of all school districts other than 'new teachers' and 'beginning teachers,'* as those phrases are defined in the exception therein relating to districts of under eight hundred pupils, are subject to the terms of the act generally, exclusive of this exception, with respect to their right to be granted what are termed therein 'continuing contracts.' ”  
(Emphasis added.)

My attention has been called to an unreported case decided in 1944, by the Court of Appeals of Athens County, being No. 482, State, ex rel. Williams v. Board of Education. The relator showed that she held a life certificate and had been employed as a teacher in the schools of the district from the 18th day of January 1937, until the time of filing her petition, August 29, 1944, except during the school years of 1940 and 1941; that the school district had less than eight hundred pupils. She further claimed that she was duly nominated by the superintendent for reemployment for the school year 1944-1945; that the respondent board had not rejected the recommendation by a three-fourths vote, but had refused to grant a continuing contract. The prayer was for a writ of mandamus commanding the granting of such continuing contract.

It should be noted that she had only four and one-half years of teaching credit in the district prior to June 1, 1941, and therefore could not and did not claim the right to the automatic grant of a continuing contract. The record of the case shows no pleading by the board but an entry was filed November 10, 1944, wherein the court ordered the respondent board to grant relator a continuing contract. The entry does not disclose the grounds upon which the court based its decree, but it is quite consistent with the conclusions which I have indicated and the distinction which I have pointed out. The teacher in that case was not a "new teacher" or a "beginning teacher", and therefore did not come within the second proviso of Section 4842-8 supra, but was entitled to the rights given by the general provisions of that section, including the right to a continuing contract on the recommendation of the superintendent unless rejected by a three-fourths vote of the entire board. In other words, she was in the same position in that respect as was the relator in the Bishop case.

Let us now consider how the conclusion above indicated affects the situation set out in your request. I understand from your letter and from a letter from the county superintendent attached to it, that the teacher in

question was first employed by the present board six years ago, and that he had had a continuing contract in the district where he had previously taught. It is very clear therefore that when he came to the present board he came as a "new teacher" as defined in paragraph "b" of the section under consideration. His employment and reemployment if the board sees fit to reemploy him, would be governed by the provisions of paragraphs "b", "c" and "d", unless his status was affected by the fact that he had enjoyed a continuing contract status under another board.

I find nothing in the law that would give a teacher who has had a continuing contract with a given district, any specific *right*, on that account, to receive a continuing contract when he terminates such employment. It will be recalled that under the definition of "continuing contract", it is to remain in effect "until the teacher *resigns*, elects to retire or is retired" etc. The case of *State, ex rel Ford v. Board of Education*, 141 Ohio St., 124, appears to determine that the effect of a resignation by a teacher who had a complete right to a continuing contract is to put an end to that right. It was held:

"A certificated public school teacher, having been employed by a school board for more than five consecutive years, who, after the effective date of the Ohio Teachers' Tenure Act in 1941, voluntarily accepted a contract for the balance of the school year and at about the same time tendered her resignation operative at the close of such year, which resignation was accepted, is concluded thereby and is not thereafter entitled to a writ of mandamus directing such board of education to issue her a continuing contract under the first proviso of Section 7690-2, General Code."

I am of the opinion that the teacher in the case you present, terminated his continuing contract status when he quit his former position to enter into new employment.

Accordingly, it seems clear that the teacher in question, although eligible for a continuing contract status, has no superior right to it under the general provision of Section 4842-8, General Code, and that in the event he is recommended for reemployment by the superintendent the board may by a mere majority vote of its members, refuse to reemploy him.

Coming to your second question it appears that the teacher in question, having come to the district six years ago as a "new teacher", was properly given a three year contract as authorized by paragraph "b". At the conclusion of that term he was given a further contract for three



years, pursuant to paragraph "c". If he is now recommended by the superintendent for reemployment, the board is under no obligation to reemploy him, but if it decides to do so the contract must under the provision of paragraph "d", be for five years, or the board may grant a continuing contract.

Your attention should be called to the further provision of said Section 4842-8, as to giving of notice of the board's intention not to reemploy a teacher. It was held by the Supreme Court in the case of *State, ex rel Foster v. Board of Education*, 151 Ohio St., 413, that the provision of the statute as to such notice applies to all districts, including those having less than eight hundred pupils. I have no information whether such notice was given in this case and therefore do not consider it necessary to discuss that situation further.

In specific answer to your questions, it is my opinion and you are advised:

1. Where a teacher is first employed in a school district of less than eight hundred pupils, subsequent to the first day of September, 1941, the effective date of former Section 7690-2, now Section 4842-8, of the General Code, known as the Teachers Tenure Act, his employment and reemployment are governed by the provisions of paragraphs a, b, c and d, of the second proviso contained in such section.

2. A teacher who was first employed in a school district of less than eight hundred pupils, subsequent to the first day of September, 1941, the effective date of the Teachers Tenure Act, and who is eligible under the law for a continuing contract, may be recommended by the county superintendent for reemployment on such continuing contract, but the board of education may reject such recommendation by a majority vote of its membership.

3. Such teacher, who, after his original employment was reemployed on a three year contract, may upon the expiration of that contract, be reemployed, but the board is under no obligation to reemploy him. However, if he is then reemployed under the provisions of paragraph "d" of the second proviso of Section 4842-8, General Code, he must be given a five year contract or the board may at any time grant him a continuing contract.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General